U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue date: 02Apr2002

CASE NO.: 2001-BLA- 01

In the Matter of

RANDELL MAYNARD,
Claimant

v.

ISLAND CREEK COAL CO. & FMC CORP.,
Employers

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Paul E. Frampton, Esq.,
For FMC Corp.

Mary Rich Maloy, Esq.,
For Island Creek Coal Co.

Toye Olarinde, Esq.,
For The Director

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS[1]

This proceeding arises from a miner's duplicate claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*., as amended ("Act"), filed on August 16, 1999. The Act and

[1] Sections 718.2 and 725.2(c) address the applicability of the new regulations to pending claims.

implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal workers pneumoconiosis" ("CWP") as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed his prior claim for benefits on March 10, 1998. (Director's Exhibit ("DX") 37-1). The claim was denied by the district director, on August 12, 1998, because the evidence failed to establish Mr. Maynard met any of the elements of entitlement. (DX 37-25).

The claimant filed this claim for benefits on August 16, 1999. (Director's Exhibit ("DX") 1). The claim was denied by the district director, on December 30, 1999, because the evidence failed to establish that Mr. Maynard was totally disabled due to pneumoconiosis. (DX 17). On February 25, 2000, the claimant requested a hearing before an administrative law judge. (DX 18). On September 7, 2000, the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs (OWCP) for a formal hearing. (DX). I was assigned the case on July 11, 2001, 2001.

On November 15, 2001, I held a hearing in Charleston, West Virginia, at which the employers and Director, Office of Workman Compensation Programs (OWCP) were represented by counsel.[2] The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 2, 3, and 5, Director's exhibits ("DX") 1- 40, Employer's exhibits ("EX") 1- 12, and FMC exhibit 1 were admitted into the record.

Post-hearing evidence consists of employer exhibits 13 and 14, readings of the claimant's two X-rays of 1992 and 1997. (TR 26).

---

[2] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(en banc), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction. Under *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989), the area the miner was exposed to coal dust, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.

ISSUES[3]

I. Whether the miner has pneumoconiosis as defined by the Act and the Regulations?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner is totally disabled?

IV. Whether the miner's disability is due to pneumoconiosis?

V. Whether there has been a material change in the claimant's condition?

FINDINGS OF FACT

I. Background

A. Coal Miner[4]

The parties agreed and I find the claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations.[5] (TR 10). Mr. .Maynard was engaged in coal mine construction as a carpenter working on building forms into which concrete was poured, building

---

[3] Several issues were withdrawn, at the hearing. (TR 10).

[4] Former subsection 718.301(a) provided that regular coal mine employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses and shall not be contingent upon a finding of a specific number of days of employment within a given period. 20 C.F.R. § 718.301 now provides that it must be computed as provided by § 725.101(a)(32). The claimant bears the burden of establishing the length of coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1-34 (1984). Any reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. *See Croucher v. Director, OWCP*, 20 B.L.R. 1-67, 1-72 (1996)(en banc); *Dawson v. Old Ben Coal Co.*, 11 B.L.R. 1-58, 1-60 (1988); *Vickery v. Director, OWCP, 8 B.L.R. 1-430, 1-432 (1986); Niccoli v. Director, OWCP*, 6 B.L.R. 1-910, 1-912 (1984).

[5] § 725.202 Miner defined; condition of entitlement, miner (Applicable to adjudications on or after Jan. 19, 2001).

(a) Miner defined. A "miner" for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:

(1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or

(2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

(Emphasis added).

preparation plants, among other coal mine construction tasks, such as removing old mining equipment. (TR 17-18). Moreover, he worked either in the tipple or around it building retaining walls and truck dumps and thus was regularly exposed to coal mine dust. (TR 18).

20 C.F.R. § 725.202 (Jan. 19, 2001)(65 Fed. Reg. 80061) Miner defined; condition of entitlement, miner:

> (a) Miner defined. A "miner" for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:
>
> (1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
>
> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

In *Glem v. McKinney*, 33 F.3d 340 (4th Cir. 1994), the Court affirmed the administrative law judge's and Board's finding that an electrical construction worker qualified as a "miner" under the Act. However, it said it believed the two-step test, of *Director, OWCP, v. Consolidation Coal Co.*, 923 F.2d 38, 41-42 (4th Cir. 1991), should not be applied to construction workers because if it is coal mine construction workers would "rarely, if ever, qualify as miners under the Act." See also, *R & H Steel Buildings, Inc. v. Director, OWCP*, 146 F.3d 514, Case No. 97-3409 (7th Cir., June 16, 1998)(The claimant was found to be a miner under the Act. He worked on several surface coal mine construction projects which did not actually involve mining).

Here, the employers have not rebutted the presumption by the methods available. It is established Mr. Maynard was regularly employed in or around a coal mine or coal preparation facility and engaged in construction of the mine sites.

Even though it is clear Mr. Maynard's work at Island Creek and FMC constituted coal mine employment, it is equally established that his subsequent coal mine construction work with Ruttman Construction, Rebel Construction, GLC Construction, L.C. Graham, Brook Construction, and Orion, each of a year or more, constituted coal mine employment. (TR 34-36). However, according to Mr. Maynard, Brook Construction, and L.C. Graham may be out of business. His work with Powellton, Rutherford, DB Moore, SI McAllister and Antares was less than a year. The Rutherford and Antares work was not coal mine employment. The director had asserted that both Orion and L.C. Graham are

bankrupt, according to a Dunn & Bradstreet listing. (DX 37-13). However, the record lacked adequate evidence regarding operators after Island Creek and FMC, specifically regarding Ruttman, GLC Construction and Rebel Construction.

The solicitor has made an yeoman's attempt to offer additional proof, post-hearing, regarding the viability of Brook Construction Company, B&C Contractors, GLC Construction, and Rebel Construction . However, no request or allowance was made at the hearing for the introduction of such evidence post-hearing. Nor was there any showing why the DOL did not submit this evidence before or at the hearing. I therefore decline to consider it. 29 C.F.R.§ 18.55. It is not the employer's burden to show subsequent operators inability to assume liability, it is the Director's. *England v. Island Creek Coal Co.*, 17 B.L.R. 1-141, 1-144 (1993). (The burden is on the Director to investigate and assess liability against the proper operator, the named operator is not required to affirmatively prove a subsequent operator's inability to assume liability. Where the evidence is insufficient to establish the subsequent operator's inability to pay benefits, the named operator is entitled to dismissal and liability imposed upon the Trust Fund)**.**

Mr. Maynard was a coal miner for at least nineteen years. (Appendix A).[6] My findings, in Appendix A are based upon his Social Security earnings per quarter and per year, as well as his listing of work, worksheets, and hearing testimony. Since he had coal mine employment of more than one years duration subsequent to working with the two named operators and there is no meaningful information in evidence concerning those operators, it is not appropriate to keep the two named operators in the case.

B. Date of Filing[7]

The claimant filed his claim for benefits, under the Act, on August 16, 1999. (DX 1). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

---

[6] Where there is more than one operator for whom the claimant worked a cumulative total of at least one year, 20 C.F.R. § 725.493(a)(1) imposes liability on the most recent employer. *Snedecker v. Island Creek Coal Co.*, 5 B.L.R. 1-91 (1982)(§ 725.495(a) for claims filed on or after Jan. 19, 2001). One year of coal mine employment may be established by accumulating intermittent periods of coal mine employment. 20 C.F.R. § 725.493(c))(See § 725.101(32) for adjudications on or after Jan. 19, 2001). Under 718.301 (effective Jan. 19, 2001), the length of coal mine employment "must" be computed under 725.101(a)(32) criteria.

[7] 20 C.F.R. § 725.308 (Black Lung Benefits Act as amended, 30 U.S.C.A. §§ 901-945, § 422(f)).

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner . . . There is no time limit on the filing of a claim by the survivor of a miner.
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed . . . the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

C. Responsible Operator[8]

Neither named operator is the last employer for whom the claimant worked a cumulative period of at least one year and therefore they are not the properly designated responsible coal mine operator in this case, under Subpart F (Subpart G for claims filed on or after Jan. 19, 2001[9]), Part 725 of the Regulations.[10]

---

[8] Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator, or if the responsible operator is unknown or is unable to pay benefits, with the Black Lung Disability Trust Fund. 20 C.F.R. § 725.493 (a)(1) defines responsible operator as the claimant's last coal mine employer with whom he had the most recent cumulative employment of not less than one year.

[9] § 725.495 Criteria for determining a responsible operator. (**Applicable to claims filed on or after Jan. 19, 2001**).

"(a)(1) The operator responsible for the payment of benefits in a claim adjudicated under this part (the ``responsible operator") shall be the potentially liable operator, as determined in accordance with § 725.494, that most recently employed the miner. . . (b) It shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with § 725.494(e). . .

(d). . . (when) the operator finally designated as responsible pursuant to § 725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation. If the reasons include the most recent employer's failure to meet the conditions of § 725.494(e), the record shall also contain a statement that the Office has searched the files it maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of § 725.494(e)(1) or (e)(2). Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim."

[10] I observe that the insurance policy or contract of each non-self-insured operator must contain a provision that insolvency or bankruptcy of the operator or discharge or both "shall not relieve the carrier from liability" to pay benefits. 20 C.F.R. 726.204(b).

20 C.F.R. § 725.492. The terms "operator" and "responsible operator"are defined in 20 C.F.R.§ § 725.491 and 725.492. The regulations provide two rebuttable presumptions to support a finding the employer is liable for benefits: (1) a presumption that the miner was regularly and continuously exposed to coal dust; and (2) a presumption that the miner's pneumoconiosis **(disability or death and not pneumoconiosis for claims filed on or after Jan. 19, 2001)** arose out of his employment with the operator. 20 C.F.R. §§ 725.492(c) and 725.493(a)(6) (§§ 725.491(d) and 725.494(a) for claims filed on or after Jan. 19, 2001). To rebut the first, the employer must establish that there were *no* significant periods of coal dust exposure. *Conley v. Roberts and Schaefer Coal Co.*, 7 B.L.R. 1-309 (1984); *Richard v. C & K Coal Co.*, 7 B.L.R. 1-372 (1984); *Zamski v. Consolidation Coal Co.*, 2 B.L.R. 1-1005 (1980). To rebut the second, the operator must prove "within reasonable medical certainty or at least probability by means of fact and/or expert opinion based thereon that the claimant's exposure to coal dust in his operation, at whatever level, did not result in, or contribute to, the disease." *Zamski v. Consolidation Coal Co.*, 2 B.L.R. 1-1005 (1980). The second presumption has been rebutted in this case.

D. Dependents

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife, Sharon.

E. Personal, Employment and Smoking History[11]

The claimant was born on July 31, 1946. (DX 1). He married Sharon nee Simms, on September 15, 1999. (DX10). He claimed to have worked in the coal mines for twenty-three years, until 1996, when he was laid off. (DX 1). The claimant last position in the coal mines was that of a coal mine construction worker who constructed coal preparation plants. (Hearing Transcript (TR) 18).

The claimant's work involved heavy labor. (TR 17). He would start mine construction jobs as a carpenter, then be called upon to do form settings for concrete pours, which involved placement of reinforced steel. He would be required to take out old mining machinery, and frequently lift and carry heavy panels and forms. (TR 17). He was required to walk a lot and was exposed to significant coal mine dust. (TR 18-19). He now has a productive cough and does not sleep well. (TR 19).

There is evidence of record that the claimant's respiratory disability is due, in part, to his history of cigarette smoking. Mr. Maynard testified he smoked a pack every two or three days from age 20 until about 1992. (TR 14).

II. Medical Evidence

A. Chest X-rays[12]

There were thirty-two readings of eight X-rays, taken between 06/04/92 and 07/12/00. Most of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102 (b).[13] Four readings of three X-rays are positive by physicians who are Board-certified in radiology and/or

---

[11] "The BLBA, judicial precedent, and the program regulations do not permit an award based solely upon smoking-induced disability." 65 Fed. Reg. 79948, No. 245 (Dec. 20, 2000).

[12] In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed**.** 20 C.F.R. § 718.102(e)(effective Jan. 19, 2001).

[13] ILO-UICC/Cincinnati Classification of Pneumoconiosis - The most widely used system for the classification and interpretation of X-rays for the disease pneumoconiosis. This classification scheme was originally devised by the International Labour Organization (ILO) in 1958 and refined by the International Union Against Cancer (UICQ) in 1964. The scheme identifies six categories of pneumoconiosis based on type, profusion, and extent of opacities in the lungs.

B-readers.[14] Two of the X-rays found positive have readings by physicians, Drs. Alva Deardorf and Bassali, whose credentials are unknown. Twenty-eight readings of six X-rays are negative by physicians who are either B-readers, Board-certified in radiology, or both.

Exh. #	Dates: 1. X-ray 2. read	Reading Physician	Qualific-ations	Film Qual-ity	ILO Classif-ication	Interpretation or Impression
CX 2, 3	06/04/92 06/18/92	W. Alva Deardorff		1	1/1, s/p, 4 LZ	
EX 2 (FMC)	06/04/92 01/24/02	Wheeler	B; BCR	1		Normal, except possible minimal obesity.
EX 2 (FMC)	06/04/92 01/24/02	Scott	B; BCR	1		Completely negative.
EX 2 (FMC)	06/04/92 01/23/02	Gaylor	B; BCR	1		Completely negative.
DX 32	09/11/93 05/18/00	Wiot	B; BCR	1		Negative.
DX 34	09/11/93 05/24/00	Spitz	B; BCR	1		Negative.
DX 36	09/11/93 06/18/00	Meyer	B; BCR	1		Negative.
CX 5	08/14/97 08/25/97	M. Bassali		1	1/0, q/t, 6 LZ	
EX 13	08/14/97	Spitz	B; BCR	1		Negative.
EX 13	08/14/97	Wiot	B; BCR	1		Negative.

[14] *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 310, n. 3. "A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading X-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. §37.51. Courts generally give greater weight to X-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993)."

Exh. #	Dates: 1. X-ray 2. read	Reading Physician	Qualific-ations	Film Qual-ity	ILO Classif-ication	Interpretation or Impression
EX 13	08/14/97	Shipley	B; BCR	1		Negative.
DX 37-19	04/17/98 04/17/98	Ranavaya	B	1	0/1, p/p, 6 LZ	
DX 37-18	04/17/98 05/31/98	McFarland	B; BCR	1		Negative.
EX 6	04/17/98 11/28/00	Binns	B; BCR	1		Negative.
EX 6	04/17/98 11/30/00	Baek	B; BCR		0/1, s/t, 4 LZ	Nonspecific interstitial changes with no evidence of CWP.
EX 6	04/17/98 12/08/00	Abramowitz	B; BCR	1		Negative.
DX 32	07/30/98 05/18/00	Wiot	B; BCR	1		Negative.
DX 34	07/30/98 05/24/00	Spitz	B; BCR	1		Negative.
DX 36	07/30/98 06/18/00	Meyer	B; BCR	1		Negative.
DX 16	09/22/99 09/22/99	Ranavaya	B	1	1/0, p/q, 6 LZ	
DX 15	09/22/99 11/05/99	Navani	B; BCR	2		Negative.
DX 14	09/22/99 11/30/99	Gaziano	B	2	1/0, q/q, 6 LZ	
DX 33	09/22/99 05/23/00	Wiot	B; BCR	1		Negative.
DX 36	09/22/99 06/04/00	Spitz	B; BCR	1		Possible Em. No evidence of CWP.

Exh. #	Dates: 1. X-ray 2. read	Reading Physician	Qualific-ations	Film Qual-ity	ILO Classif-ication	Interpretation or Impression
DX 36	09/22/99 06/18/00	Meyer	B; BCR	2		Negative.
EX 7	09/22/99 12/12/00	Fino	B			Negative.
EX 9	09/22/99 01/11/01	Castle	B	2	0/1, t/s, 2 LZ	
EX 7	09/22/99 12/12/00	Fino	B	1	0/0	
DX 35	05/03/00 07/23/00	Zaldivar	B	1		Negative.
EX 1	07/12/00 07/17/00	Sparks	B; BCR	1	0/1, p/p, 4 LZ	co; em; mild COPD; cardiomegaly.
EX 3	07/12/00 10/12/00	Wiot	B; BCR	2		Negative.
EX 4	07/12/00 10/23/00	Spitz	B; BCR	1		Negative.
EX 8	07/12/00 11/30/00	Shipley	B; BCR	1		Negative.

* A- A-reader; B- B-reader; BCR- Board-certified radiologist; BCP-Board-certified pulmonologist; BCI= Board-certified internal medicine; BCI(P)= Board-certified internal medicine with pulmonary medicine sub-specialty. Readers who are Board-certified radiologists and/ or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 N.16, 98 L.Ed. 2d 450 (1987) and, *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists. LZ=lung zones.

** The existence of pneumoconiosis may be established by chest X-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest X-ray classified as category "0," including subcategories "0/-, 0/0, 0/1," does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983)(Under Part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997))*(en banc)*(*Unpublished*). If no categories are chosen, in box 2B(c) of the X-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

B. Pulmonary Function Studies[15]

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

Physician **Date** **Exh.#**	**Age** **Height**	**FEV_1**	**MVV**	**FVC**	**Tra-cings**	**Compre-hension Cooper-ation**	**Qualify * Conf-orm****	**Dr.'s Impression**
L.K. 07/16/92 EX 2	45 70"	3.67		4.90	Yes		No*	Fino finds normal. (EX 7).
St. Francis 09/10/93 DX 37-15	47 69"	3.12	112	4.49			No*	Fino finds normal. (EX 7).
Ranavaya 04/17/98 DX 37-15	51 70"	3.20 3.07+	46.1 53.2+	4.42 4.04+	Yes	Fair Fair	No* No*	Mild obstructive disease. Zaldivar finds normal and valid. (Dep. 19). Fino finds normal. (EX 7). Crisalli finds very mild obstruction. (Dep. p. 19).
Ranavaya 09/22/99 DX 11	53 70"	3.10 2.99+	51.0 48.4+	4.29 4.35+	Yes	Good Good	No* No*	Mild obstruction. Zaldivar finds normal despite submaximal effort. (DX 35; Dep. 18). Fino finds normal. (EX 7). Crisalli finds very mild obstruction. (Dep. p. 17).
Zaldivar 05/03/00 DX 35	53 70"	2.41 2.36+	50 57+	3.32 3.14+	Yes		No* No*	Mild FVC reduction from lack of effort. Hyperinflation. Normal diffusion. Invalid PFS results.

[15] § 718.103 (a) is effective for tests conducted after Jan. 19, 2001(see § 718.101(b)).

Physician **Date** **Exh.#**	**Age** **Height**	**FEV_1**	**MVV**	**FVC**	**Tra-cings**	**Compre-hension Cooper-ation**	**Qualify * Conf-orm****	**Dr.'s Impression**
Crisalli 07/12/00 EX 1	53 69"	1.43 1.41+	28	2.36 1.97+	Yes	variable	Yes* Yes*	Dr. Zaldivar finds invalid. (FMC 1, Dep. p. 15). Crisalli finds invalid from variable effort. (EX 1). Fino finds invalid. (EX 7).

* A "**qualifying"** pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

** A study "**conforms**" if it complies with applicable quality standards (found in 20 C.F.R. § 718.103(b) and (c)). (*see Old Ben Coal Co. v. Battram*, 7 F.3d. 1273, 1276 (7th Cir. 1993)). A judge may infer, in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).

+Post-bronchodilator.

For a miner of the claimant's height of 69 inches, § 718.204(b)(2)(i) requires an FEV_1 equal to or less than 2.11 for a male 53 years of age.[16] If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.67 or an MVV equal to or less than 84; or a ratio equal to or less than 55% when the results of the FEV1 test are divided by the results of the FVC test. Qualifying values for other ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

Height	Age	FEV_1	FVC	MVV
69"	45	2.24		
70"	45	2.30		
69"	47	2.21		
70"	47	2.27		
70"	51	2.21	2.78	88
69"	53	2.11	2.67	84
70"	53	2.17	2.74	87

[16] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 43 F.3d 3 (4th Cir. 1995). I find the miner is 69" here, his most recent reported height.

C. Arterial Blood Gas Studies[17]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

Date Ex.#	**Physician**	**PCO_2**	**PO_2**	**Qualify**	**Physician Impression**
04/17/98 DX 37-17	Ranavaya	34 37+	74 104.4+	No No	
09/22/99 DX 13	Ranavaya	39.8 37+	81 81.9+	No No	Fino finds normal. (EX 7).
05/03/00 DX 35	Zaldivar	33 28+	101 116+	No No	Normal. Fino finds normal. (EX 7). Crisalli finds normal. (Dep. p. 16).

+ Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b). Appendix C to Part 718 (Effective Jan. 19, 2001) states: "Tests shall not be performed during or soon after an acute respiratory or cardiac illness."

D. Diffusion Capacity

A diffusion capacity test (DLCO) was administered by Dr. Zaldivar, on May 3, 2000. (DX 35). The DLCO was 86% and DLCO/VA percentage 126%. Dr. Zaldivar found this normal.

E. Physicians' Reports

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques,

---

[17] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.
20 C.F.R. § 718.204(b)(2) permits the use of such studies to establish "total disability." It provides:
In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability: . . .
(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part . . .

concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Mohammed Ranavaya's is a B-reader. His form report, based upon his examination of the claimant, on September 22, 1999, notes twenty-three years of coal mine employment and a one half pack per day, fourteen-year smoking history. (DX 12). Dr. Ranavaya related the miner's complaint that he could only walk only 100 feet on level ground, 50 feet uphill, climb ten stairs, or lift 100 pounds without suffering shortness of breath. (DX 12).

Based on his examination, the miner's history, an EKG, a non-qualifying arterial blood gases, a non-qualifying pulmonary function study, and a positive ("1/0") chest X-ray, Dr. Ranavaya diagnosed CWP due to coal mine dust exposure and hypertension. (DX 12). He did not address the impact, if any, of the claimant's cigarette consumption. He found no impairment.

Dr. Ranavaya had conducted a similar evaluation, testing and examination, on April 17, 1998. (DX 37-16). He had then concluded, based on a non-qualifying AGS, a non-qualifying PFS, an EKG, and negative ('0/1") X-ray, that Mr. Maynard neither suffered from CWP nor was he impaired. (DX 37-16).

Dr. George L. Zaldivar is a B-reader and is Board-certified in internal medicine with a sub-specialty in pulmonary medicine. His report, based upon his review of enumerated records and examination of the claimant, on May 3, 2000, notes nineteen some years of coal mine employment and a fourteen-year smoking history. (DX 35). Based on non-qualifying arterial blood gases, non-qualifying pulmonary function studies, and negative chest X-rays, Dr. Zaldivar diagnosed no pulmonary disease or problems at all. Nor did he find the miner impaired.

Dr. Zaldivar testified at a deposition, on May 1, 2001. (FMC 1). He reiterated the substance of his earlier report and his elaborated on his impressive credentials. He reiterated that Mr. Maynard did not cooperate during either Dr. Crisalli's or his PFS, but nevertheless has an entirely normal breathing capacity and no respiratory disease. (Dep. 20). Nor does he have any respiratory impairment. His poor exercise tolerance is due to deconditioning. (Dep. 21-2).

A supplemental report of Dr. Zaldivar, dated February 17, 2001, wherein he reviewed additional materials, was submitted by the employer. (EX 11). He persisted in his conclusions that the miner had neither CWP nor any respiratory disability. Even if Mr. Maynard had CWP, he would not be impaired.

Dr. Robert Crisalli is Board-certified in internal medicine with a subspecialty in pulmonary medicine. (EX 1). His report, based upon a review of enumerated records and his examination of the

claimant, on July 12, 2000, notes eighteen years of coal mine employment and a one pack per three days, twenty-two-year smoking history. (EX 1).

Based on a non-qualifying arterial blood gases, an invalid pulmonary function study, and a negative ("0/1") chest X-ray, Dr. Crisalli diagnosed: no CWP, possible chronic bronchitis not obstructing his airways, and obstructive sleep apnea. He did not specify the etiology of the possible chronic bronchitis. (EX 1).

A supplemental report from Dr. Crisalli, dated November 30, 2000, was submitted by the employer. (EX 5). He reviewed additional enumerated medical reports and opined the miner may have a very mild pulmonary function impairment related to asthma, based on physical examination findings. Even if he had CWP, he is not disabled.

Dr. Crisalli testified at a deposition, on April 11, 2001. (EX 12). He reiterated the substance of his earlier report and his elaborated on his credentials. Looking at all the evidence, he continued to opine that Mr. Maynard neither suffered from CWP nor had any disabling respiratory impairment. He felt the miner had asthma unrelated to coal dust exposure or smoking. (Dep. 24-6). From a respiratory view, he is able to perform heavy labor. Even if the miner smoked half as much, it would not affect Dr. Crisalli's opinion.

Dr. Gregory Fino, who is Board-certified in internal medicine with a subspecialty in pulmonary diseases, and is a B-reader, reviewed the claimant's medical records on behalf of the employer and submitted his opinions in a report, dated December 13, 2000. (EX 7). His consultation report notes twenty-plus years of coal mine employment and a one-third pack per day twenty-four-year smoking history. (EX 7). Dr. Fino concluded that the claimant did not have pneumoconiosis and that he had no respiratory disability or impairment. Even if he had CWP, he would not be impaired.

Dr. Thomas Jarboe, who is Board-certified in internal medicine with a sub-specialty in pulmonary diseases, and is a B-reader, reviewed the claimant's medical records on behalf of the employer and submitted his opinions in a report, dated February 19, 2001. (EX 10). His consultation report notes twenty-three years of coal mine employment and a one-third pack per day twenty-four-year smoking history. (EX 10). He found no CWP based on the weight of negative X-ray evidence. Nor do his PFSs indicate a dust-induced lung disease. Moreover, his valid PFS and AGS show no respiratory impairment. Even if he suffered from CWP, he would not be impaired. (EX 10).

III. Other

Mr. Maynard received a 15 percent disability award, in 1993, from the West Virginia Occupational Pneumoconiosis Board. (TR 23; CX 1; DX 37-4).

IV. Witness' Testimony

Mr. Maynard testified that he left work in 1996 because he was having "a whole lot of breathing trouble, plus I had other problems," such as back, neck, ankle, and elbow injuries, as well as carpal tunnel syndrome. (TR 14). Starting in 1992 and worsening, anytime he had to hurry or lift something, he would choke up and it strained his breathing. (TR 15-16). He no longer plays ball or hunts due to breathing problems. (TR 15-16). He can no longer climb hills.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and, (3) he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205*; Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). *Lane v. Union Carbide Corp*., 105 F.3d 166, 170 (4th Cir. 1997). The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP, v. Mangifest*, 826 F.2d 1318, 1320 (3d Cir. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986).

Since this is the claimant's second claim for benefits, he must initially show that there has been a material change of conditions.[18]

To assess whether a material change in conditions is established, the Administrative Law Judge ("Administrative Law Judge") must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of entitlement previously

[18] Section 725.309(d) provides, in pertinent part:

> In the case of a claimant who files more than one claim for benefits under this part, . . . [i]f the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the [Director] determines there has been a material change in conditions . . . (Emphasis added).

adjudicated against him in the prior denial.[19] *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996) (*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den*. 117 S.Ct. 763 (1997); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 B.L.R. 2-76 (3d Cir. 1995). *See Hobbs v. Clinchfield Coal Co.* 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Unlike the Sixth Circuit in *Sharondale*, the Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee Mines*, 86 F.3d at 1363 n.11. The Administrative Law Judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) and *LaBelle Processing Co. v. Swarrow*, 72 F. 3d 308 (3rd Cir. 1995).

In *Caudill v. Arch of Kentucky, Inc*., 22 B.R.B. 1-97, BRB No. 98-1502 (Sept. 29, 2000)*(en banc on recon.*), the Benefits review Board held the "material change" standard of section 725.309 "requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has occurred." Unless an element has previously been adjudicated against a claimant, "new evidence cannot establish that the miner's condition has changed with respect to that element." Thus, in a claim where the previous denial only adjudicated the matter of the existence of the disease, the issue of total disability "may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions. . ."

The claimant's prior application for benefits was denied because the evidence failed to show that: (1) the claimant had pneumoconiosis; (2) the pneumoconiosis arose, at least in part, out of coal mine employment; and (3) the claimant was totally disabled by pneumoconiosis. Under the *Sharondale* standard, the claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred. If he can show that a material change has occurred, then the entire record must be considered in determining whether he is entitled to benefits.[20] *Sharondale*.

Here, as discussed in detail below, the claimant has failed to establish any material change in his condition. Nevertheless, I review his entire medical history.

---

[19] *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122, BRB No. 98-0714 BLA (Feb. 19, 1999). Lay testimony, standing alone, regarding the miner's worsened condition, since the denial of his last claim, is insufficient to establish a material change of condition, under 20 C.F.R. § 725.309, absent corroborating medical evidence.

[20] *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122, BRB No. 98-0714 BLA (Feb. 19, 1999). Lay testimony, standing alone, regarding the miner's worsened condition, since the denial of his last claim, is insufficient to establish a material change of condition under 20 C.F.R. § 725.309, absent corroborating medical evidence.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[21] 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.[22]

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[23] Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

---

[21] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1364; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995) at 314-315. In *Henley v. Cowan and Co.*, 21 B.L.R. 1-148 (May 11, 1999), the Board holds that aggravation of a pulmonary condition by dust exposure in coal mine employment must be "significant and permanent" in order to qualify as CWP, under the Act.

[22] Regulatory amendments, effective January 19, 2001, state:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.
(Emphasis added).

[23] The definition of pneumoconiosis, in 20 C.F.R. section 718.201, does not contain a requirement that "coal dust specific diseases . . . attain the status of an "impairment" to be so classified. The definition is satisfied "whenever one of these diseases is present in the miner at a detectable level; whether or not the particular disease exists to such an extent as to become compensable is a separate question." Moreover, the legal definition of pneumoconiosis "encompasses a wide variety of conditions; among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nevertheless been made worse by coal dust exposure. *See*, e.g., *Warth*, 60 F.3d at 175." *Clinchfield Coal v. Fuller*, 180 F.3d 622 (4th Cir. June 25, 1999) at 625.

" . . . [T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) *citing*, *Rose v. Clinchfield Coal Co.*, 614 F. 2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995) and *see* § 718.201(a)(2).

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106;[24] (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion.[25] 20 C.F.R. § 718.202(a)(4).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis. This is contrary to the Board's view that an administrative law judge may weigh the evidence under each subsection separately, *i.e.* X-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4). In so holding, the court cited to the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25 (3d Cir. 1997) which requires the same analysis.

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim filed after

---

[24] A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis, but positive results will constitute evidence of the presence of pneumoconiosis 20 C.F.R. § 718.106(c).

[25] In accordance with the Board's guidance, I find each medical opinion documented and reasoned, unless otherwise noted. *Collins v. J & L Steel*, 21 B.L.R. 1-182 (1999) *citing Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); and, *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997). This is the case, because except as otherwise noted, they are "documented" (medical), i.e., the reports set forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis and "reasoned" since the documentation supports the doctor's assessment of the miner's health.

Jan. 1, 1982, with no evidence of complicated pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest X-ray evidence.[26] 20 C.F.R. § 718.202(a)(1). The correlation between "physiologic and radiographic abnormalities is poor" in cases involving CWP.[27] "[W]here two or more X-ray reports are in conflict, in evaluating such X-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." *Id.; Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985)."(Emphasis added). (Fact one is Board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991) at 1-37. Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985).

A judge is not required to defer to the numerical superiority of X-ray evidence, although it is within his or her discretion to do so. *Wilt v. Woverine Mining Co.*, 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990). This is particularly so where the majority of negative readings are by the most qualified physicians. *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31, 1-37 (1991). Here, the only positive readings are by B-readers or readers whose qualifications are unknown. Prior to 1999, the miner had only two positive readings by readers whose qualifications are unknown. Moreover, those X-rays, when re-read, were found negative. Thereafter, when dually-qualified readers examined the X-rays, the readings were consistently negative. All five readings of the miner's most recent X-rays, taken in 2000 and 2001 were negative. Thus, I do not find CWP established by X-ray evidence.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray. 20 C.F.R. § 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). However, where the physician's report, although documented, fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith*

---

[26] "There are twelve levels of profusion classification for the radiographic interpretation of simple pneumoconiosis. . . *See* N. LeRoy Lapp, '*A Lawyer's Medical Guide to Black Lung Litigation*,' 83 W. VA. LAW REVIEW 721, 729-731 (1981)." Cited in *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1359, n. 1.

[27] See Footnote 4.

v. Eastern Coal Co., 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it.[28] *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

Physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). Because of their various Board-certifications, B-reader status, and expertise, as noted above, I rank Drs. Zaldivar, Crisalli, Fino, and Jarboe, equally and as the best qualified in this matter.

Drs. Zaldivar, Crisalli, Fino, and Jarboe, all found the miner did not suffer from CWP. Only Dr. Ranavaya diagnosed CWP, primarily based on the one positive X-ray he read. Although he had examined the miner twice, once in 1998 and in 1999, he had not thoroughly reviewed the miner's longer term medical history as had the more qualified physicians finding no CWP. Moreover, he did not discuss the impact, if any, of the miner's cigarette smoking. Dr. Jarboe issued the most recent report, in 2001, diagnosing no CWP or for that matter no lung disease. The asthma, found by Dr. Crisalli is unrelated to coal mine dust exposure.

A general disability determination by a state or other agency is not binding on the Department of Labor with regard to a claim filed under Part C, but the determination may be used as some evidence of disability or rejected as irrelevant at the discretion of the fact-finder.[29] *Schegan v. Waste Management & Processors, Inc.*, 18 B.L.R. 1-41 (1994); *Miles v. Central Appalachian Coal Co.*, 7 B.L.R. 1-744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-1157 (1984) (opinion by the West Virginia Occupational Pneumoconiosis Board of a "15% pulmonary functional impairment" is relevant to disability but not binding). *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988). Thus, I give the state determination some weight as to the existence of pneumoconiosis.

Taking all the evidence together, I find the claimant has not met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S.

---

[28] *Fields v. Director, OWCP*, 10 B.L.R. 1-19, 1-22 (1987). "A 'documented' (medical) report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is 'reasoned' if the documentation supports the doctor's assessment of the miner's health. *Fuller v. Gibraltor Coal Corp*., 6 B.L.R. 1-1291 (1984). . ."

In *Cornett v. Benham Coal, Inc*., 227 F.3d 569, Case No. 99-3469, 22 B.L.R. 2-107 (6th Cir. Sept. 7, 2000), the Court held if a physician bases a finding of CWP only upon the miner's history of coal dust exposure and a positive X-ray, then the opinion should not count as a reasoned medical opinion, under 20 C.F.R. § 718.202(a)(4). (It also rejected Dr. Fino's opinion that the miner's affliction was due solely to smoking and not coal dust exposure because the PFS were not consistent with fibrosis, as would be expected in simple CWP. Fibrosis, while an element of medical CWP, is not a required element of legal CWP).

[29] See § 718.206 "Effect of findings by persons or agencies." (65 Fed. Reg. 80050, Dec. 20, 2000)(Effective Jan. 19, 2001). If properly submitted, such evidence shall be considered and given the weight to which it is entitled as evidence under all the facts before the adjudication officer in the claim.

267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) *aff'g sub. Nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d730, 17 B.L.R. 2-64 (3d Cir. 1993).

C. Cause of pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment.[30] 20 C.F.R. § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).[31]

Since the miner had ten years or more of coal mine employment, the claimant would ordinarily receive the benefit of the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. However, in view of my finding that the existence of CWP has not been proven this issue is moot. Moreover, the presumption is rebutted by the medical opinion evidence discussed herein.

D. Existence of total disability due to pneumoconiosis

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b).[32] Sections 718.204(b)(2)(i) through (b)(2)(iv) set forth criteria to establish total disability: (i) pulmonary function studies with qualifying values; (ii) blood gas studies with qualifying values; (iii) evidence the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart

---

[30] *Cranor v. Peabody Coal Co.*, 21 B.L.R. 1-201, BRB No. 97-1668 (Oct. 29, 1999) *on recon.* 22 B.L.R. 1-1 (Oct. 29, 1999)(*En banc*). Judge did not err considering a physician's X-ray interpretation "as positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1) without considering the doctor's comment." The doctor reported the category I pneumoconiosis found on X-ray was not CWP. The Board finds this comment "merely addresses the source of the diagnosed pneumoconiosis (& must be addressed under 20 C.F.R. § 718.203, causation).

[31] Specifically, the burden of proof is met under § 718.203(c) when "competent evidence establish[es] that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment." *Shoup v. Director, OWCP*, 11 B.L.R. 1-110, 1-112 (1987).

[32] § 718.204 (Effective Jan. 19, 2001). Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis, states:

(a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

failure; (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment; and lay testimony.[33] Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987).

Section 718.204(b)(2)(iii) is not applicable because there is no evidence that the claimant suffers from cor pulmonale with right-sided congestive heart failure. § 718.204(d) is not applicable because it only applies to a survivor's claim or deceased miner's claim in the absence of medical or other relevant evidence.

Section 718.204(b)(2)(i) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. Of the six PFS conducted between 1992 and 2000, only one had "qualifying" results and those I find are invalid based on the opinions of Drs. Zaldivar, Crisalli, and Fino. They all found invalidity due to variable effort and/or lack of effort.

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(b)(2)(ii). All of the miner's AGS are "non-qualifying" and thus do not establish CWP.

Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b). Under this subsection, " . . . all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Camp Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204. The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and

---

[33] In a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish disability." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). See 20 C.F.R. § 718.204(d)(5)(living miner's statements or testimony insufficient alone to establish total disability). But, pre-death statements of a now deceased miner "shall be considered" in determining whether the miner was totally disabled at the time of death. 20 C.F.R. § 718.204(d)(4).

the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

I find that the miner's last coal mining positions required heavy manual labor. Because the claimant has not established his symptoms do not render him unable to perform the functions of his last coal mine job, I find he is capable of performing his prior coal mine employment.

Judges may rely on physician reports which do not discuss the exertional requirements of a miner's work if the physician concludes that the miner suffers from no impairment at all. *Lane v. Union Carbide & Director, OWCP*, 21 B.L.R. 2-34, 2-46, 105 F.3d 166, 172 (4th Cir. 1997).

No physician has found the miner is totally disabled by CWP in this case.

The Fourth Circuit rule is that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994). In *Milburn Colliery Co. v. Director, OWCP,[Hicks]*, 21 B.L.R. 2-323, 138 F.3d 524, Case No. 96-2438 (4th Cir. Mar. 6, 1998) *citing Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994), the Court had "rejected the argument that '[a] miner need only establish that he has a total disability, which may be due to pneumoconiosis in combination with nonrespiratory and nonpulmonary impairments.'" Even if it is determined that claimant suffers from a totally disabling respiratory condition, he "will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems." *Id*. at 534.

I find the claimant has not met his burden of proof in establishing the existence of total disability. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), *aff'g sub. Nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d730, 17 B.L.R. 2-64 (3d Cir. 1993).

E. Cause of total disability

The January 19, 2001 changes to 20 C.F.R. § 718.204(c)(1)(i) and (ii), adding the words "material" and "materially", results in "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. No. 245, 79946 (Dec. 20, 2000).[34]

---

[34] Effective January 19, 2001, § 718.204(a) states, in pertinent part:
For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or

The Board requires that pneumoconiosis be a "contributing cause" of the miner's disability. *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(*en banc), overruling Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

The Fourth Circuit Court of Appeals requires that pneumoconiosis be a "contributing cause" of the claimant's total disability.[35] *Toler v. Eastern Associated Coal Co.*, 43 F. 3d 109, 112 (4th Cir. 1995); *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994). In *Street*, the Court emphasized the steps by which the cause of total disability may be determined by directing "the Administrative Law Judge [to] determine whether [the claimant] suffers from a respiratory or pulmonary impairment that is totally disabling and whether [the claimant's] pneumoconiosis contributes to this disability." *Street*, 42 F.3d 241 at 245.

There is evidence of record of the claimant's history of cigarette smoking. However, to qualify for Black Lung benefits, the claimant need not prove that pneumoconiosis is the "sole" or "direct" cause of his respiratory disability, but rather that it has contributed to his disability. *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 914 F.2d 35, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-76. *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*). There is no requirement that doctors "specifically apportion the effects of the miner's smoking and his dust exposure in coal mine employment upon the miner's condition." *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*) *citing generally, Gorzalka v. Big Horn Coal Co.*, 16 B.L.R. 1-48 (1990).

If the claimant would have been disabled to the same degree and by the same time in his life had he never been a miner, then benefits cannot be awarded. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990).[36]

I find the claimant has not met his burden of proof in establishing the existence of total disability due to CWP.

---

nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

[35] *Hobbs v. Clinchfield Coal Co.* 917 F.2d 790, 792 (4th Cir. 1990). Under *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, *914 F.2d 35* (4th Cir. 1990), the terms "due to," in the statute and regulations, means a "contributing cause.," not "exclusively due to." In *Roberts v. West Virginia C.W.P. Fund & Director, OWCP*, 74 F.3d 1233 (1996 WL 13850)(4th Cir. 1996)(Unpublished), the Court stated, "So long as pneumoconiosis is a 'contributing' cause, it need not be a 'significant' or substantial' cause." Id.

[36] "By adopting the 'necessary condition' analysis of the Seventh Circuit in *Robinson*, we addressed those claims . . . in which pneumoconiosis has played only a *de minimis* part. *Robinson*, 914 F.2d at 38, n. 5." *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195 n. 8 (4th Cir. 1995).

ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has not established that a material change in conditions has taken place since the previous denial. The claimant has not proven he has pneumoconiosis, as defined by the Act and Regulations or that pneumoconiosis, if any, arose out of his coal mine employment. The claimant has not proven he is totally disabled or that any disability is due to pneumoconiosis. He is therefore not entitled to benefits.

ORDER[37]

It is ordered that the claim of RANDELL MAYNARD for benefits under the Black Lung Benefits Act is hereby DENIED. Both of the named putative responsible operators, FMS and Island Creek Coal Company, are DISMISSED, and will henceforth not be named in the case.

A
RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

PAYMENT IN ADDITION TO COMPENSATION: 20 C.F.R. § 725.530(a)(Applicable to claims adjudicated on or after Jan. 20, 2001) provides that "An operator that fails to pay any benefits that are due, with interest, shall be considered in default with respect to those benefits, and the provisions of § 725.605 of this part shall be applicable. In addition, a claimant who does not receive any benefits within **10 days** of the date they become due is entitled to additional compensation equal to **twenty percent** of those benefits (see § 725.607)."

---

[37] § 725.478 Filing and service of decision and order (Change effective Jan. 19, 2001).

Upon receipt of a decision and order by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.

NOTICE OF APPEAL RIGHTS (**Effective Jan. 19, 2001**): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e, at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601**.[38] A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, at the Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

[38] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001).

(d) Regardless of any defect in service, **actual receipt** of the decision is sufficient to commence the 30-day period for requesting reconsideration or appealing the decision.